BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF CASE

The facts are utterly without dispute. The work of Avance as a freight and passenger brakeman took him from Poplar Bluff, Missouri, where he worked off the board, to Dupo, Illinois, Memphis, Tennessee, and Little Rock, Arkansas (R. 12). On the morning of the accident his crew reported for work at Bismarck, Missouri, at 6:30 A. M. (R. 13). They started to make up train number 57 (R. 13). From 7:00 until 9:00 o'clock the crew engaged in switching cars, both loads and empties, and had placed a number of cars in their train on track 7 before the accident occurred (R. 4). Admittedly some of these cars were interstate (R. 28).

The train being prepared was a regularly scheduled freight train operating from Bismarck to Poplar Bluff, both in Missouri, and its scheduled departure time from Bismarck was 7:00 A. M. (R. 13, 45). When the train left that morning it carried PTX-4741 billed to Texarkana, Arkansas (R. 25). At the time of the accident this interstate car was being hauled and moved by the engine (R. 24).

About 9:00 o'clock the crew delivered twenty or thirty cars to the Missouri-Illinois Railroad Company (R. 14). Admittedly this delivery was an interstate one (R. 29).

The delivery to the M. & I. also involved a pick up, and in returning to the yard the crew brought back four cars, one of which was PTX-4741 (R. 24). It was about three-quarters of a mile from the M. & I. delivery to the place where the accident occurred (R. 14). Avance walked back and had just joined his crew when the movement occurred which resulted in the accident (R. 14, 15). There was only one de-

livery to the M. & I. that day (R. 27). It will be noted that at the time of the accident the crew was returning from an interstate delivery to another railroad company and was hauling PTX-4741, an interstate car, for placement in train number 57. This car as well as the three others brought back from the M. & I. came in that morning on number 93 from St. Genevieve, Missouri. Train number 93 entered the State of Missouri from the State of Illinois at St. Genevieve, Missouri, which as any map will show, is directly on the state line. Its population is 2,662. As said by Conductor Maddock, the four cars being hauled by the engine "came over from the M. & I. that comes into St. Genevieve from Illinois" (R. 25, 26). Train 93 came into Bismarck, Missouri, from Illinois that very morning (R. 26).

On the way back from the M. & I. delivery, the crew stopped at the coal chute in order to spot two loaded coal cars and to pick up three empties and take them along over in the yard (R. 30). It was while kicking the three empty coal cars out of their way that the accident occurred.

The origin and destination of the five coal cars does not appear because respondent did not produce its records with respect to them, but the wheel report as well as the testimony of Conductor Maddock shows that PTX-4741, which was also being hauled and moved by the engine, and which came in on train number 93, was on its way either from the State of Illinois or Missouri to the State of Arkansas (R. 24, 25, 65). The conductor testified without dispute that "leaving Bismarck that day according to the wheel report, among the eleven cars that we had, two of them were going to Texarkana, Texas or Arkansas" (R. 25).

By sworn admissions the respondent conceded that train 57 was an interstate one, that the crew switched interstate cars in the yard before the accident occurred and that the delivery to the M. & I. was an interstate one (R. 28, 29).

It was the purpose of the crew in doing their switching work to make up their train on track number 7 and also to make up a cut of cars on track number 8 to be taken to the M. & I. (R. 32). All the switching was for those two purposes (R. 32). The movement which caused the accident took only a few minutes (R. 34). It was necessary for the crew before leaving for Poplar Bluff to make up their train, do the yard work, make the M. & I. delivery, and put the three empty coal cars, whose bumping caused the accident, over in the yard (R. 30-31, 39-40).

SPECIFICATION OF ERRORS TO BE ARGUED

The Supreme Court of Illinois erred:

1. In holding that the issue of interstate commerce should have been submitted to a jury.

2. In refusing to recognize and apply the 1939 amendment to the F. E. L. A.

3. In holding against the application and validity of the 1939 amendment to the F. E. L. A.

ARGUMENT

I.

Where the Facts Are Undisputed the Question of Interstate Commerce Is One of Law.

In *Philadelphia & Reading Ry. Co. vs. Hancock*, 253 U. S. 284, holding that cars were in interstate commerce although merely on their way to a classification yard and not yet inspected, weighed or billed to consignees in another state, this Court said:

> "The essential facts are not in controversy; the nature of the employment, therefore, is a question of law."

This is the universal rule in both federal and state courts throughout the country, including Illinois. *Edwards vs. B. & O. R. Co.*, 131 F. (2d) 366; *Lukon vs. Pennsylvania R. Co.*, 131 F. (2d) 327; *Reading Co. vs. Larkin*, 114 F. (2d) 416; *Wabash Ry. Co. vs. Bridal*, 94 F. (2d) 117; *Sullivan vs. Wabash Ry. Co.*, 23 F. (2d) 323; *Youngstown & O. R. Co. vs. Halverstodt*, 12 F. (2d) 995; *Davis vs. Dowling*, 284 F. 670; *Gidley vs. Chicago Short Line Ry. Co.*, 346 Ill. 122, 178 N. E. 400; *Pipal vs. Grand Trunk W. R. Co.*, 341 Ill. 320, 173 N. E. 372; *Larigne vs. Chicago, M., St. P. & P. R. Co.*, 287 Ill. App. 253, 4 N. E. (2d) 785; *Benson vs. Chicago, R. I. & P. R. Co.*, 267 Ill. App. 11, aff'd 352 Ill. 195, 185 N. E. 244; *Mitchell vs. Louisville & Nashville R. Co.*, 194 Ill. App. 77.

The other state cases are too numerous to cite. The *Donat* case, 239 U. S. 50, and the *Lloyd* case, 239 U. S. 496, cited in the opinion (R. 84) hold that no reversible error appears where a trial court submits the issue to the jury which decides it correctly. Decision that no prejudicial error appears where the issue was submitted to the jury is not tantamount to decision that the failure to have done so would constitute reversible error. These cases are without helpful relevance. This Court in each merely affirmed the decision of the courts below. Both were decided before the *Hancock* case, *supra*.

II.

It Conclusively Appears as a Matter of Law That the Parties Were Engaged in Interstate Commerce Under the 1939 Amendment.

Specifically foreshadowing an amendment to broaden the coverage of the F. E. L. A., this Court in *Illinois Central R. Co. vs. Behrens*, 233 U. S. 473, announced that it entertained no doubt of the power of Congress under the commerce clause of the Constitution to include an employe "whether

the particular service being performed at the time of the injury, isolatedly considered, was interstate or intrastate commerce."

Congress has now exercised such power. In 1939 it amended the F. E. L. A. so that it now includes any employe "any part of whose duties as such employe shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce * * *." Ignoring the *Behrens* case, it was held in *Thomson vs. Industrial Commission*, 380 Ill. 386, 44 N. E. (2d) 19, that the amendment was unconstitutional. The amendment has been sustained and applied in:

Federal cases:

Edwards vs. B. & O. R. Co., 131 F. (2d) 366.

Ermin vs. Pennsylvania R. Co., 36 F. Supp. 936.

Agostino vs. Pennsylvania R. Co., 50 F. Supp. 726.

New York:

Wright vs. New York Central R. Co., 263 App. Div. 461, 33 N. Y. S. (2d) 531.

Pennsylvania:

Scarborough vs. Pennsylvania R. Co., 154 Pa. Super. 124, 35 Atl. (2d) 603.

Indiana:

Prader vs. Pennsylvania R. Co., 113 Ind. App. 518, 49 N. E. (2d) 387.

Kansas:

Piggue vs. Baldwin, 154 Kan. 708, 121 Pac. (2d) 183.

Williams vs. Chicago, R. I. & P. R. Co., 155 Kan. 813, 130 Pac. (2d) 596.

Skanks vs. Union Pacific R. Co., 155 Kan. 584, 127 Pac. (2d) 431.

New Jersey:

McFadden vs. Pennsylvania R. Co., 130 N. J. L. 601, 34 Atl. (2d) 221.

California:

Southern Pac. Co. vs. Industrial Accident Commission, 19 Cal. (2d) 271, 120 Pac. (2d) 880.

Southern Pac. Co. vs. Industrial Accident Commission, 19 Cal. (2d) 283, 120 Pac. (2d) 888.

Lewis vs. Industrial Commission, 19 Cal. (2d) 284, 120 Pac. (2d) 886.

Southern Pac. Co. vs. Industrial Accident Commission, 19 Cal. (2d) 281, 120 Pac. (2d) 887.

Arkansas:

Missouri Pacific R. Co. vs. Fisher (Ark.), 117 S. W. (2d) 725.

Tennessee:

Louisville & N. R. Co. vs. Potts, 178 Tenn. 425, 158 S. W. (2d) 729.

Iowa:

McCall vs. Pitcairn, 232 Iowa 867, 6 N. W. (2d) 415.

Wisconsin:

Great Northern R. Co. vs. Industrial Commission, 245 Wis. 375, 14 N. W. (2d) 152.

These authorities hold that it is now immaterial that the employe might have been engaged in intrastate work at the precise moment of injury. The Circuit Court of Appeals of the Seventh Circuit, wherein Illinois is located, in *Edwards vs. B. & O. R. Co.*, 131 F. (2d) 366, declared the intent of Congress to be clear. Perhaps the best statement of the congressional philosophy is in *Wright vs. New York Central R. Co., supra:*

> "A case would turn upon some slight differentiation in duty or operation, more apparent than real. There was much hair splitting and little certainty. It was to avoid all this and to give a fixity of application that Congress amended this act on August 11, 1939, to include 'any employe of a carrier, any part of whose duties

> as such employe shall be the furtherance of interstate or foreign commerce.' Thus the scope of the statute was broadened so as to include practically all employes of interstate carriers, including such employes as this claimant, and to do away with the borderline cases. Fine distinctions are no longer necessary. The act is now all inclusive and made so purposely. The language 'any part of whose duties' is almost as broad as words can make it and we should apply it in the spirit in which it was written."

In the *Agostino* case the employe was spreading cinder ballast on a new track that had never been used for any kind of commerce. In the three California cases the employe was engaged in intrastate switching. In the *Skanks* case the employe was loading sand bags on a flat car which were later to be used to protect an interstate track from flood. In the *Piggue* case the employe was sweeping up ashes and debris around the station platform and a receiving track. In the *Ermin* case the employe was hauling dead, intrastate engines. In the *Scarborough* case the employe was installing electric lights at Bryn Mawr station, which was used by only three interstate trains a year. In the *Prader* case a section employe was making a seven mile trip by automobile to obtain a rule book so that he could acquaint himself with the duties of a flagman. In the *Potts* case the employe was injured in intrastate switching. In the Wisconsin case the employe was a signal man attached to a crane repairing an ore dock which was out of use. All were held entitled to the protection of the F. E. L. A. under the 1939 amendment.

The Supreme Court not only ignored the decisions of this Court, but also each and every one of the above authorities, which were called to its attention.

III.

Irrespective of the 1939 Amendment the Petitioner Was Engaged in Interstate Commerce as a Matter of Law.

In *Philadelphia & Reading Ry. Co. vs. Hancock*, 253 U. S. 284, it was held that where the cars had started on their journey to a classification yard it was immaterial that they had not yet been billed to a foreign state. Here at the moment of the accident PTX-4741 was on its way to a foreign state. The records with reference to its billing were not produced and hence, as said in *Pipal vs. Grand Trunk W. R. Co.*, 341 Ill. 320, 173 N. E. 372, holding that a local switching movement does not interrupt interstate commerce:

> "Its records were in its possession and it could have introduced them had it seen fit. * * * The failure of a party to a suit to produce evidence available to him gives rise to a presumption against him."

It was said in *Mitchell vs. L. & N. R. Co.*, 375 Ill. 545, 31 N. E. (2d) 965, that under such circumstances "every presumption and intendment will be indulged against defendant." This Court has indicated in *Philadelphia & R. Co. vs. Polk*, 256 U. S. 332, that the presumption is in favor of interstate commerce. One interstate car makes the entire train an interstate one and where an employe is engaged in both kinds of commerce, his remedy is under the Federal Act. *New York Central & H. R. Co. vs. Carr*, 238 U. S. 260; *Youngstown & O. R. Co. vs. Halverstodt*, 12 F. (2d) 995; *Koons vs. Philadelphia & R. Ry. Co.*, 271 Pa. 468, 114 Atl. 262. Preparatory movements in aid of interstate commerce bring the case under the Federal Act whether the particular car being switched was interstate or not and whether a specific train was being prepared. *Benson vs. Chicago, R. I. & P. R. Co.*, 267 Ill. App. 11, aff'd 352 Ill. 195, 185 N. E. 244; *Mitchell vs. L. & N. R. Co.*, 375 Ill. 545, 31 N. E. (2d) 965. A local or temporary switching movement does not terminate

the interstate character of the work. *Herb vs. Pitcairn*, 306 Ill. App. 583, 29 N. E. (2d) 543; *Pipal vs. Grand Trunk W. R. Co.*, 341 Ill. 320, 173 N. E. 372. Members of an interstate train crew who stopped to move a local, intrastate car are under the Federal Act. *Wabash Ry. Co. vs. Bridal*, 94 F. (2d) 117. Going and returning to pick up an interstate car constitutes an entire trip and an incidental stoppage for an intrastate purpose does not interrupt it. *Sullivan vs. Wabash Ry. Co.*, 23 F. (2d) 323; *Davis vs. Dowling*, 284 F. 670. If the accident and injury would delay an interstate movement, then the work is closely related to interstate transportation. *Wabash Railway Co. vs. Bridal*, 94 F. (2d) 117. Number 57 was two hours late in leaving that morning (R. 45).

IV.

Critique of Opinion Below.

It is incredible that the Supreme Court should have overlooked the undisputed evidence that the work of petitioner as a brakeman in freight and passenger service took him to three different states (R. 12). Other features of the court's opinion place a strain on credulity, particularly the misrepresentation of the sworn admissions filed by respondent.

It is said that "On demand of plaintiff defendant filed a number of admissions * * *" (R. 81). This is not true. The motion is clear and definite and sought to obtain the original records (R. 4, 5). This motion the court allowed (R. 9).

It will be noted that the court below held that the entire issue "largely hinges around the movement of this empty tank car PTX-4741" (R. 83). This, of course, is not true. Under the 1939 amendment we are concerned with the duties of petitioner generally as well as upon the occasion in question and the isolated history of PTX-4741 is largely imma-

terial. It is notable that respondent produced no records with reference to the origin of PTX-4741. It is notable that while respondent produced the train switch list of Conductor Rehm for train 93 showing PTX-4741, it did not produce the wheel report, which would have shown its origin.

Instead of producing this document, respondent filed, not at the demand of the petitioner, but for its own convenience, its sworn admissions wherein it conceded the interstate character of petitioner's work (R. 28, 29). Strange, indeed, is the assumption by the court that PTX-4741 "left St. Genevieve, Missouri, to Texarkana, Arkansas * * *" (R. 84). It is far more reasonable to assume that PTX-4741 came from Illinois but whether it did or not, the movement to Arkansas is interstate all the way. The court adds, "There is nothing to show how this car got to St. Genevieve" (R. 84). Nowhere does the court disclose the basis of its novel deduction that a movement from some place other than St. Genevieve, Missouri, to Arkansas might be interstate but one from St. Genevieve, Missouri, to Arkansas might with propriety be deemed by a jury to be intrastate. The court said that it did not "appear that this tank car was billed when it came into Bismarck" (R. 84). The reason it did not so appear was because of the respondent's failure to produce the previous wheel report but, whether it did or not is of no concern under this Court's opinion in the *Hancock* case, which is thus not only ignored but directly repudiated. Billing is not essential to an interstate trip.

Note the following phraseology in the court's opinion: "If it was billed when it left St. Genevieve, Missouri, to Texarkana, Arkansas, it could be inferred it was in interstate commerce." From *Gibbons vs. Ogden* to the *S. E. A. U.* and *National Polish Alliance* cases, it has never been doubted that a movement from one state to another is interstate in character and excludes any necessity for "inferring" by any

tribunal. The court then proceeds with the wholly unfounded and gratuitous assumption that if the car went from St. Genevieve, Missouri, to Texarkana, Arkansas, "unbilled" there could then be a "serious question"! (R. 84).

The requirement that an injured plaintiff or the widow and orphans of a deceased railway employe must dig into the archives of the adversary and establish the precise moment of "billing" is not only contrary to the decision of this Court twenty-five years ago in the *Hancock* case but is also patently ridiculous. It imposes a condition impossible of fulfillment. How will counsel for respondent account for their failure to have included this information, now deemed essential, in their sworn admissions? The court below seems to have been entirely mystified by the absence of any reference to PTX-4741 on what it refers to as "the switching list at the Bismarck yard when the train was made up and left at 10:50 A. M. * * *" (R. 84). We can only assume that what the court refers to as the switching list is actually the "Report of Cars on Hand," being Plaintiff's Exhibits 13 and 14 (R. 73, 74; received R. 27). The only reasonable inference is that the absence of PTX-4741 from Plaintiff's Exhibits 13 and 14 indicates that it was not regarded as one of the "cars on hand." It was not on hand in the Bismarck yard but was merely passing through to Arkansas and thus was omitted from the yard clerk's time check, being Plaintiff's Exhibits 13 and 14 (R. 73, 74; received R. 27). Another undisputed fact is that of the nine cars which the engine was attached to and hauling at the time of the accident (R. 23, 24) seven appear on Plaintiff's Exhibits 13 and 14 (R. 73, 74) as cars on hand but PTX-4741 and PRX-504009 do not (R. 73, 74).

According to the opinion below the hours from 6:30 A. M., when petitioner went on duty, until 9:30 A. M., when the accident happened, do not constitute a part of "the entire day

of January 17th, 1942" (R. 84). Five separate admissions were filed (R. 28, 29). They were numbered separately (R. 28, 29). Were it not for the fact that the court mentioned one of the admissions, it would be supposed that by reason of neglect and inadvertence they had escaped attention. This cannot be so, however, because the court, referring to one of the five admissions, construes it as limited in point of time only to that portion of the day subsequent to the accident (R. 84). The significance of the admission is that the train was interstate in character. The preparation of an interstate train for its journey is as much interstate as the journey itself. The statement of the court that the admission only applies during the entire day and not necessarily prior to the time of the accident indicates that the author of it did not appreciate the significance of the interstate character of the train. He apparently was under the impression that no work in connection with an interstate train could bring one under the F. E. L. A. unless it occurred after the departure of the train from its point of origin.

This apart, the court neglects to mention the other four admissions (R. 28, 29). This could hardly have been the result of inadvertence. Admissions 2, 3, 4 and 5 refer to the work before departure (R. 28, 29). This must necessarily be so because these admissions relate to work done while petitioner was a member of the crew (R. 28, 29). The unjudicial attitude of the court is manifested not only by the omissions and distortions of the record, but also by the determined effort of its author to place the evidence in the light most unfavorable to the petitioner. We note the statement that the train when it left at 10:50 A. M. contained twelve cars "and only PTX-4741 was interstate" (R. 84). We might inquire just how many cars it should require to make a train really and genuinely interstate.

The opinion below is calculated to convey the impression

that petitioner predicated his case on the argument that PTX-4741 "was moving from a point in Illinois to one in Arkansas" (R. 83). This is just another misstatement. Excerpts from petitioner's brief in the Supreme Court will demonstrate that he contended that it made no difference whether the car came from Illinois on its way to Arkansas or whether it originated in Missouri on its way to Arkansas (R. 78, 79). The opinion states that "there was some evidence to show that the PTX-4741 car started in Missouri instead of Illinois" (R. 83). The opinion further states that one witness testified the cars came from St. Genevieve, Missouri (R. 83, 84). Both statements are false. Conductor Maddock testified, "This is a list of the cars that came over from the M. & I. and which were brought in by train 93, that is, the M. & I. that comes into St. Genevieve from Illinois" (R. 25, 26).

CONCLUSION

In the *Behrens* case, 233 U. S. 473, this Court said it entertained no doubt of the power of Congress to include employes whose work, isolatedly considered, was intrastate. In defiance of this decision the *Thomson* case, 380 Ill. 386, 44 N. E. (2d) 19, held the amendment unconstitutional. In the *Hancock* case, 253 U. S. 284, this Court held that where the facts are undisputed interstate commerce is a question of law. The court below held it was a jury issue. This Court has repeatedly held that, "Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." *Brady vs. Southern Ry. Co.*, 320 U. S. 476; 2 *Roberts' Federal Liabilities of Carriers*, 2d Ed., Section 821.

The court below ignored numerous federal decisions directly in point on the facts, even those discussed in the opinion of the Appellate Court, 320 Ill. App. 406, 51 N. E. (2d)

334, including the decision of the Circuit Court of Appeals of its own circuit in *Edwards vs. B. & O. R. Co.*, 131 F. (2d) 366.

We have heretofore established that the court below misrepresented the record. Under such circumstances our duty to our client impels us to challenge the *bona fides* of its decision.

The outcome of this case is a tragedy to the petitioner. Its future use by the claim departments of railroad companies like the one here involved which (with associated companies and with offices from New York to California) form transcontinental systems, will be a tragedy to unfortunate victims of railroad accidents. Its anachronistic implications will be used to stiffen and encourage the opposition of railroad companies to the efforts of the National Railroad Retirement Board to obtain a national compensation act. It will be used for the purpose of avoiding responsibilities of federal legislation imposed upon carriers by the F. E. L. A., the Boiler Inspection Act and the Safety Appliance Acts at a time when the employes of drug stores and grocery stores are being brought under the influence of the commerce power of Congress because their activities closely and directly affect interstate transportation.

Perhaps judicial action cannot be entirely controlled by its results but it need not be blind to those results.

Respectfully submitted,

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